

1 UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF NEW JERSEY

3 CITY SELECT AUTO SALES, INC.,
4 a New Jersey corporation,
5 Individually and as the
6 Representative of a class of
7 similarly situated persons,

8 Plaintiffs,

9 vs.

CIVIL ACTION
NO. 11-2658 (JBS)

MOTION

10 DAVID RANDALL ASSOCIATES, INC.
11 and RAYMOND MILEY, III,

12 Defendants.

13 UNITED STATES COURTHOUSE
14 ONE JOHN F. GERRY PLAZA
15 4TH AND COOPER STREETS
16 CAMDEN, NEW JERSEY 08101
17 FRIDAY, DECEMBER 14, 2012

18 B E F O R E: THE HONORABLE JEROME B. SIMANDLE
19 CHIEF JUDGE
20 UNITED STATES DISTRICT JUDGE

21 A P P E A R A N C E S:

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CERTIFICATE # 1492
OFFICIAL U.S. REPORTER

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1 DEPUTY CLERK: All rise.

2 THE COURT: Be seated, please.

3 This is the matter of City Select Auto Sales
4 Incorporated vs. David Randall Associates, Inc., Civil No.
5 11-2658. Today's the return date for oral argument on a
6 number of motions. There's a plaintiff's motion for class
7 certification, there's a defendant's motion for default
8 against the third-party defendants. Technically there's three
9 motions from the plaintiff to cite additional authorities.
10 The additional authorities are before the Court, they're being
11 considered, and Mr. Fitzpatrick will have the opportunity to
12 argue against them today or undermine the authorities.

13 And so let's begin with the motion for class
14 certification. Mr. Lewis.

15 MR. LEWIS: Thank you, your Honor.

16 My name is the Tod Lewis and I'm here on behalf of Bock
17 & Hatch on behalf of the plaintiff and the class, putative
18 class in this case. I'm joined by Alan Milstein of the
19 Sherman, Silverstein firm.

20 Your Honor, we seek certification of a class of 29,113
21 persons who received essentially the same document by fax,
22 over 44,000 faxes, over -- on six separate days over about a
23 six-week period in the period late March through about the
24 middle of May 2006. This faxed document was an advertisement
25 that was sent to plaintiff and other class members without

1 prior express invitation or permission. The defendant has not
2 produced any contrary evidence in this case.

3 A class should be certified here because it meets all
4 the requirements of Rule 23(a) and Rule 23(b)(3). We've also
5 provided the Court with citations to numerous federal cases
6 certifying TCPA classes involving primarily purchased lists of
7 fax numbers and those involving Business To Business Solutions
8 who defendant hired in this case. In this case the purchase
9 list was procured from an outfit called Info U.S.A. Your
10 Honor, numerosity is satisfied because there are 29,113 class
11 members, a joinder is impractical.

12 Commonality is also satisfied because the same
13 advertisement was sent on six days occurring over a six-week
14 period to anonymous third party lists that was purchased from
15 Info U.S.A., as I said before, which the defendant never even
16 reviewed.

17 Typicality, your Honor, is met because the plaintiff's
18 claims arise over the same course of conduct and the same
19 advertisement.

20 Adequacy is met because there are no conflicting
21 interests between the plaintiff and the class members. Also,
22 the Third Circuit requires, as to counsel, that counsel be
23 qualified, experienced, and generally able to conduct the
24 case. Also, here again, the plaintiff has no antagonistic
25 interest with the class. We are qualified, experienced, and

1 able to do this litigation as we've proved across the nation.

2 I'd like to take a little bit of time on the adequacy
3 section because the defendants have spent the majority of
4 their time in this case taking issue with our adequacy.

5 Defendants --

6 THE COURT: Well, before you do, a lot of the
7 criticism seems to be directed at Anderson & Wanca. What role
8 would they play in this case if the class were certified and
9 your firm were the class counsel?

10 MR. LEWIS: Well, they would serve as co-counsel in
11 the case, they would serve whatever role the Court desired.

12 THE COURT: What makes them co-counsel? They're not
13 members of the Bar of this Court nor have they been admitted
14 *pro hac vice*.

15 MR. LEWIS: We could have them admitted *pro hac vice*
16 if the Court desires.

17 THE COURT: Well, it's a little late for that. But
18 would your firm be able to carry the ball together with
19 Mr. Milstein's firm as class counsel?

20 MR. LEWIS: Absolutely, your Honor. Absolutely.
21 We've shown that in case after case across the country.

22 THE COURT: Are there ethically troubling aspects of
23 Anderson & Wanca's behavior in the past? Or let me ask a
24 different question. If their role is not to be as class
25 counsel and if their attorneys are not to be admitted

1 *pro hac vice* going forward, is there any reason to examine
2 Anderson & Wanca's ethics in other cases?

3 MR. LEWIS: I don't believe so, your Honor. But we
4 firmly believe that neither Ryan Kelly nor anyone with the law
5 firm of Anderson & Wanca has done anything wrong or engaged in
6 any misconduct, and I can get into the reasons with regard to
7 that.

8 THE COURT: Well, it may not be necessary or it may.
9 Let's switch subjects, and we may return to this in a
10 moment after Mr. Fitzpatrick's argument. But what about the
11 B2B hard drive? In a motion for class certification, it's not
12 a mini trial, it's not the compression of the trial, but it's
13 also not blind to the merits of the case. I think that the
14 Supreme Court and the Third Circuit have been pretty clear in
15 saying that the trial judge has a duty to peek at the merits
16 to make sure that one is not certifying a class that just
17 isn't going to go anywhere. On the other hand, this is not a
18 motion for summary judgment, it's not time for plaintiffs to,
19 quote, unquote, put up or shut up, that day could come later
20 in the case, but a class certification motion shouldn't be
21 confused with summary judgment either. But we're somewhere in
22 between, mere reliance on the pleadings, on the one hand, and
23 introducing sufficient admissible evidence to withstand
24 summary judgment on the other. And this in between place
25 probably requires me to look at the admissibility to the most

1 important piece of evidence, at least I think it is, in the
2 case.

3 Would you agree with what I said so far?

4 MR. LEWIS: Absolutely, your Honor.

5 THE COURT: Is it admissible? Is it likely that it
6 will be admissible?

7 MR. LEWIS: Absolutely, your Honor. And the
8 defendant's cited the *In re: Hydrogen Peroxide* case, the
9 plaintiffs in that case, their expert lacked any economic
10 model or analysis to support a finding of commonality in that
11 case. Here the situation is the exact opposite. The
12 plaintiffs have produced an extremely detailed and exhaustive
13 report of Robert Biggerstaff and the defendant has not offered
14 the Court any rebuttal expert.

15 The defendant has also quoted the case of *Dreyer vs.*
16 *Altchem*, well, in that case the plaintiffs produced three
17 affidavits that were procedurally deficient and, quote, bereft
18 of detail, unquote. That is not the case here. In this case
19 we have produced the December 28, 2010, declaration of
20 Caroline Abraham, which fully supports admissibility of all of
21 the B2B computer data. Federal Rules of Evidence 901(a) only
22 requires some evidence showing that the computer data is what
23 the proponent claims. There's no evidence in the record that
24 it's anything but what the proponent claims. The business
25 records exception rule also comes into play, and Ms. Abraham's

1 declaration supports the view that it is admissible under the
2 business records exception rule.

3 THE COURT: Now, you've made mention of computer
4 data, are you talking about the printout that comes from a
5 computer or are you talking about the hard drive that's been
6 referenced?

7 MR. LEWIS: Well, the hard drive and the backup DVD's
8 were analyzed by our expert Robert Biggerstaff, so it's really
9 both, your Honor.

10 Also, Federal Rules Of Evidence 902(11) and (12), the
11 Abraham declaration supports admissibility not just in the
12 context of class certification, but also admissibility at
13 trial. Abraham was the custodian of the records. Now, the
14 defendant has taken issue with the chain of custody and argues
15 that we haven't established chain of custody. But chain of
16 custody only goes to the weight, not the admissibility of the
17 B2B computer evidence. And the Court can consider basically
18 anything it wishes here at the procedural class certification
19 stage because the, as one of the cases that we quoted in our
20 brief, the gatekeeper is keeping gate only for itself. So
21 that's another.

22 But at any rate, the B2B business records are fully
23 admissible, your Honor. They are authentic. There is nothing
24 in this record to establish they've ever been tampered with or
25 anything has ever been changed. They're contemporaneous

1 business records of Business To Business Solutions.

2 THE COURT: Would you have B2B witnesses available to
3 you to lay the foundation for their admissibility at trial?

4 MR. LEWIS: We believe under Federal Rule of Evidence
5 902(11) and (12) that the declaration itself would serve as
6 the basis for their admission at trial. But we could still
7 take Ms. Abraham's deposition as well during the merits phase
8 of the case post-certification.

9 THE COURT: Is she an available witness if you needed
10 her? Or if the other side needed her, if the defendants
11 wanted to take her dep?

12 MR. LEWIS: I would --

13 THE COURT: And I know you don't pay for her.

14 MR. LEWIS: -- constitute her as -- well, she has
15 been third-partied in this case and she hasn't appeared. She
16 is, quite frankly, toward us, your Honor, a hostile witness.
17 So --

18 THE COURT: But is she within the subpoena power of
19 the Court?

20 MR. LEWIS: I don't know. I don't know. She lives
21 in Brooklyn, I don't know if that's close enough, we've never
22 looked into that.

23 THE COURT: Or you could go to Brooklyn, if need be,
24 and serve her out of the Eastern District of New York.

25 MR. LEWIS: Well, that's how all the allegations of

1 misconduct started, your Honor, was when we got a rule to
2 show cause order in front of Judge Matsumoto who ordered
3 Ms. Abraham to turn over all the B2B data, but that's kind of
4 an aside right now. But, yes, we are familiar with taking her
5 to court in the Eastern District of New York, we have before
6 and she shows for depositions and she shows -- if she's within
7 the Court's jurisdiction, we will do whatever means necessary,
8 we will do to get her to comply with the rule of law on behalf
9 of the class.

10 THE COURT: All right. And, of course, those
11 problems can be thrashed out later, but she's not
12 institutionalized or deceased?

13 MR. LEWIS: No, that is true, your Honor.

14 THE COURT: Okay. Is there anything else that you
15 want to add?

16 MR. LEWIS: A couple things.

17 The defendant has taken issue and said commonality is
18 not established because of the established business
19 relationships exception to the TCPA and the invitation or
20 permission, what's commonly known as the consent rule. The
21 defendant's arguments with that regard are completely purely
22 hypothetical, they provided no evidence to the Court. They've
23 argued that one may have given implied consent by publishing
24 one's fax number, that that might somehow be at issue here.
25 That's incorrect, according to the FCC, there's no such thing

1 as implied consent by publishing one's fax number. It's not a
2 green light to receive everybody's junk faxes that are being
3 advertised and faxed across the nation. These faxes are sent
4 anonymously to strangers to purchase third-party lists, as I
5 said before. We've produced 500 pages, the names and
6 addresses and phone numbers of all 29,113 businesses. The
7 defendant hasn't come up with even a single name of an
8 established business relationship.

9 The defendant has also --

10 THE COURT: Well, let's stay with that subject. If
11 someone has an established business relationship or a prior
12 business relationship with David Randall Associates, then they
13 would not be members of this case, would they?

14 MR. LEWIS: They can be carved out. But there's
15 also --

16 THE COURT: Shouldn't we fix the class definition
17 then so that it does carve them out? Do you have a copy of
18 the class definition?

19 MR. LEWIS: Yes, your Honor. We could, we could do
20 that.

21 THE COURT: And also wouldn't it apply to only
22 unsolicited faxes? And the word unsolicited doesn't appear in
23 the definition.

24 MR. LEWIS: We could do that, your Honor.

25 THE COURT: No, but could the plaintiff live with the

1 definition that would start out reading "All persons with whom
2 David Randall Associates did not have a prior business
3 relationship who were successfully sent one or more
4 unsolicited faxes during the period," et cetera?

5 MR. LEWIS: Yes, we can live with that. Many courts
6 have gone in that direction.

7 THE COURT: Okay.

8 MR. LEWIS: Does your Honor wish to hear anything
9 about this issue of Ryan Kelly being a material witness?

10 THE COURT: Well, doesn't that issue drop out if he's
11 not an attorney in the case?

12 MR. LEWIS: Yes, it would.

13 THE COURT: If he is an attorney, then he could still
14 be required to testify and be excluded as an attorney if need
15 be.

16 MR. LEWIS: But our argument would be that anything
17 that he would have any testimony regarding would relate to
18 procedural class action matters and not to the actual merits
19 of the case. If it relates to misconduct in some -- or
20 alleged misconduct in some form or fashion that defendants and
21 Ms. Abraham have alleged, then that now essentially would be
22 the time for that, but at trial there's no substantive purpose
23 for Mr. Kelly's testimony.

24 THE COURT: Well, there's going to be a period, even
25 if this class is certified, for discovery. And in the

1 discovery the defendant would have the opportunity to explore
2 whether this computer data is tainted in some way or whether
3 there's some reason to argue against its admissibility. And
4 if they believe that the evidence was corrupted in some way,
5 they would have the opportunity to explore that in discovery
6 and explore it with Mr. Miley if they deem it appropriate.

7 What would prevent that?

8 MR. LEWIS: To date there has been no allegation of
9 any corruption or tainting or certainly no evidence of
10 corruption or tainting or anything of the sort. But, yeah, I
11 see what you're saying.

12 THE COURT: Okay. I don't have any other questions
13 at this time.

14 MR. LEWIS: Thank you, your Honor.

15 THE COURT: Thank you, Mr. Lewis.

16 Mr. Fitzpatrick?

17 MR. FITZPATRICK: Thank you, sir.

18 As I indicated in our response, we believe that there
19 are very serious deficiencies in this application for class
20 action certification and very serious record improprieties
21 that indicate in particular that the proposed class counsel
22 are unsuitable under the federal rules.

23 I'll start from what we now know is the beginning as a
24 result of the reply memorandum that plaintiff's counsel filed
25 to this motion to dismiss -- I'm sorry, motion for class

1 certification.

2 As I indicated in my opposition to this motion, we
3 believe that the genesis of this case was the same genesis as
4 the prior iteration of this case, the *David Winter's* state
5 court complaint that was also nominated a putative class
6 action but was never prosecuted as such. In that case we
7 learned through discovery that the named plaintiff had not
8 actually been the source of the fax, the alleged fax that was
9 attached to the complaint in that case or the claim of receipt
10 of the alleged fax that the named plaintiff made in that
11 complaint. It was actually an attorney named Ryan Kelly of
12 the Anderson & Wanca firm who not only unethically solicited
13 that named plaintiff, because Mr. Kelly was not a member of
14 the Bar of New Jersey and had no right to solicit a non-client
15 with the letter that he sent anyway, and the solicitation
16 letter contained a misleading inference that there already was
17 the existence of a class.

18 In this case we now know that the same thing occurred.
19 Mr. Wanca, this is Exhibit F to the plaintiff's reply
20 memorandum in this -- to this motion for class certification,
21 that contains a letter dated December 5, 2009, from
22 Brian J. Wanca of the Anderson & Wanca Illinois law firm to
23 City Select Auto Sales.

24 Would your Honor like a copy? I can give you mine to
25 reference if it's easier.

1 (Hands up document)

2 THE COURT: Thank you.

3 MR. FITZPATRICK: I know what it says, it says the
4 exact same thing, that Ryan Kelly of his law firm formerly
5 said to the *David Winter's* named plaintiff in order to get the
6 *Winter's* plaintiff to sign up for the prior iteration of this
7 a lawsuit. In that letter Mr. Wanca -- again, on the face of
8 that letter, that's an unethical solicitation under New Jersey
9 Rules of Professional Conduct. Mr. Wanca is not licensed to
10 practice in New Jersey, but he sent a solicitation letter to a
11 New Jersey corporation. In that solicitation letter he made
12 the same misleading claim that Mr. Kelly previously made to
13 the *David Winter's* entity in order to get them to sign up
14 implying that there was an existing class and implying --
15 telling City Select that it had received a, quote, unquote,
16 junk fax and that they may not even remember having received
17 it but they could still be a plaintiff in this case and be
18 entitled to receive money. Those are two definitively clearly
19 misleading statements that have already been found to violate
20 the ethical rules in other states.

21 In the *Creative Montessori* case that I cited in our
22 brief, the court -- the Seventh Circuit remanded the district
23 court's initial finding of suitability of class counsel and
24 that finding was based on two points. The first point, the
25 district court found that the means by which Anderson & Wanca

1 obtained the subject hard drive were illegitimate in that they
2 had promised Caroline Abraham something that they would not
3 further disclose to third parties and they did so. And,
4 secondly, that the statement -- the misleading statement in an
5 identical solicitation letter that there was an existing class
6 constituted a *prima facie* ethical violation. The district
7 court so found, but nonetheless said the class representative,
8 the attorneys, it would not preclude them from representing
9 the class. But the district court made that finding and
10 referred them for disciplinary action to the Bar. That's the
11 same factual circumstance that applies here. Now, ultimately
12 that case on remand, the district court found that Caroline
13 Abraham had not been sufficiently duped on the first point but
14 never reversed the second point.

15 And in this case I'm just pointing out initially that
16 this Court is starting out with *prima facie* evidence of three
17 ethical violations on the part of an attorney who's not even
18 in this case now but whom Mr. Lewis stood here and told your
19 Honor that he's co-counsel. He is in fact, as I told -- as I
20 indicated in my brief, this firm has in fact been behind this
21 litigation to date, is still behind the litigation, is
22 inevitably intertwined with it and cannot, in our view, this
23 case can't proceed with counsel having any involvement
24 whatsoever with Anderson & Wanca as they have and as they have
25 indicated in their -- at every phase of the way.

1 I pointed out in my brief that there's quite untoward
2 and unexplained representations that have been made by all of
3 these attorneys in filings that they've made. In particular,
4 the fact that Mr. Bock's name appears on this complaint,
5 Mr. Wanca's name appears on this complaint. Mr. Milstein has
6 previously represented that they were of counsel to his firm
7 in the prior case. No of counsel relationship is shown in any
8 letterhead or anything else, and we know they're not counsel
9 in New Jersey.

10 A, number one --

11 THE COURT: Well, if Anderson & Wanca were kept out
12 of this case, does that cure the issues that you're raising,
13 including the issue of the availability of one of their
14 attorneys as a witness?

15 MR. FITZPATRICK: I don't think so. And I think
16 both -- I think Wanca and Kelly are both material witnesses in
17 this case because there's going to be a threshold inquiry as
18 to how did this case start. We know -- we now know that
19 Mr. Wanca in an unethical solicitation started this case. We
20 know something else --

21 THE COURT: Let's assume that that's true, and let's
22 assume that the issue should be pursued about whether the case
23 had an unethical solicitation at its start, why would that be
24 laid at the feet of the attorneys who would be in the case if
25 Anderson & Wanca are not going to be attorneys in the case?

1 Anderson & Wanca want to be attorneys in the case, I can say
2 yes or no to that. If I say no because of all of these issues
3 that would seem to involve their firm, why should I not permit
4 someone else to be counsel of record if it's, you know, a
5 certifiable class?

6 MR. FITZPATRICK: Because I think, as you said, let
7 them be counsel of record, would not reflect the reality that
8 Mr. Lewis just indicated to your Honor. They're co-counsel,
9 they have been involved in this case and the prior case in
10 particular in all of the tainted, what we contend are tainted
11 aspects of the case. They have been involved in this
12 litigation without disclosure to this Court up to this point
13 and there's no real -- you can't build a Chinese firewall in
14 this case, these firms obviously work together all throughout
15 the country. The Court can take judicial notice of the many
16 citations that were made in particular by the Seventh Circuit
17 in the *Creative Montessori* case.

18 I believe that there's actually impropriety that
19 Mr. Milstein knew or should have known about, that Mr. Lewis
20 knew or should have had known about. And I believe that going
21 beyond that, the appearance of impropriety, as I indicated in
22 my brief, is such in this case that the Court cannot properly
23 allow them to go forward and say, well, you'll just be -- you
24 will just be, quote, counsel of record and Anderson & Wanca
25 will not remain in this case.

1 And I underline that by pointing out an extraordinary
2 facet of this motion for certification. Mr. Milstein filed a
3 motion for certification, he was the only, quote, unquote,
4 counsel of record. He filed the motion for certification in
5 which he asserted not that he was competent counsel to handle
6 this case but that Mr. Wanca and Mr. Bock were competent
7 counsel. He went to the extraordinary lengths of submitting
8 their CV's, and he said that the Court should be assured that
9 they will properly represent the plaintiffs in this case when
10 they were not in this case and when he knew or should have
11 known by his own document, Exhibit F, that Brian Wanca could
12 never be in this case.

13 We think it's not just -- it's record impropriety and
14 it's rampant appearance of impropriety so strong that it could
15 not be overcome by any order stating that just Mr. Bock's firm
16 and Mr. Milstein's firm should be counsel of record. And
17 again, in responding to your Honor, your Honor's question,
18 Mr. Lewis said we have done these cases all over the country,
19 we are appropriate counsel, we're good counsel, he's talking
20 about not Mr. Milstein and not himself, because, and this is
21 no slur to Mr. Lewis, but, as I indicated in my opposition to
22 his *pro hac vice* motion, there's not one indication that he
23 has had class action experience sufficient to carry this case.
24 The case is clearly going to be carried by people in the
25 background that we know are subject to be deposed in the case

1 and that we already know have serious ethical problems.

2 There's no doubt now, it's record evidence before the Court.

3 THE COURT: Well, how much experience should be
4 required to go forward with a class action of this type where
5 the stakes to any individual member of the class are fairly
6 low and where the liability is shown fairly easily if it's to
7 be shown at all? But it's not something like medical
8 malpractice or antitrust or something more sophisticated.
9 It's kind of a light switch case in terms of liability, isn't
10 it? It's either on or off depending on whether someone
11 received an unsolicited fax.

12 MR. FITZPATRICK: I think the minimum is more than
13 none and we do not have that in this case. We have none on
14 the part of Mr. Lewis and we have a demonstrably deficient
15 showing on Mr. Milstein's part in the prior iteration of this
16 case. And while it may indeed be the case that it's a light
17 switch case, as your Honor puts it --

18 THE COURT: Well, and I don't use those words --

19 MR. FITZPATRICK: I know. I know what you're saying,
20 I'm not --

21 THE COURT: -- I was being rhetorical.

22 MR. FITZPATRICK: I totally understand that. And, be
23 that as it may, there are still significant legal issues and
24 legal problems that the experience that the federal rule
25 requires, that rule is put in there so that counsel can handle

1 things that may come up that they're not experienced about.
2 And we already know that Mr. Milstein in the underlying case,
3 he did not identify a single class member, he never filed for
4 class certification, and he ultimately let the case go for an
5 agreed statutory payment of \$1,500 for the only named
6 plaintiff.

7 Now, all the other alleged victims, recipients of these
8 alleged unwanted faxes in that case are the same as the ones
9 in this case. That case -- that litigation lasted three
10 years. And, during the course of that litigation, the statute
11 of limitations ran on all of their claims. Now, as your
12 Honor's found in this case, the statute was tolled by virtue
13 of the *American Pipe Holding*, the statute was tolled as to
14 those people who were not identified. So they didn't lose any
15 legal rights as a result of Mr. Milstein's, whatever you want
16 to call it, oversight, tactical maneuver, whatever you want to
17 call it, handling of the case, but they could have. So there
18 are significant legal matters that require some experience.
19 And we do know, as a matter of record, the only counsel who
20 are counsel of record in this case do not have any
21 demonstrable class action experience, or in the case of
22 Mr. Milstein demonstrably -- in our view have not represented
23 the putative members of that class as an experienced class
24 attorney would have done.

25 So my answer to that question is more experience than

1 the record experience before your Honor indicates.

2 THE COURT: All right. If we turn away from adequacy
3 of counsel -- or do you have anything further to say about
4 adequacy?

5 MR. FITZPATRICK: Can I just see my notes for a
6 second?

7 THE COURT: Sure.

8 MR. FITZPATRICK: Just one other thing about that,
9 about the appearance of impropriety, which I briefed and I
10 think is significant.

11 But there's one other thing that we know from this
12 record. As I have argued, this case must have come about the
13 same way the last case came about. No one from City Select
14 has made one word of attestation in support of anything that
15 your Honor has heard to date or anything of record in this
16 case, nobody from City Select. Everything you're hearing
17 comes from counsel. All the factual assertions have been made
18 by counsel. In fact, counsel are the real parties in interest
19 here. And I have argued, and I will argue again, that we
20 already have record evidence to show that these attorneys were
21 people acting in concert with them and on their behalf.
22 Actually manufactured the fax that's attached to the complaint
23 in this case just as it was learned that they manufactured it
24 in the last case, that Mr. Kelly manufactured it.

25 If your Honor references the subject fax in the

1 plaintiff's class action complaint, it facially indicates a
2 very suspect deficiency, there's no fax header at the top of
3 this fax. All fax machines print fax headers. There's no
4 sent. There's no received. There's no anything. They all
5 print fax headers by default. Whether the sender's
6 information is accurate or not, they all print fax headers.
7 This was created the same way the other was created, I
8 guarantee it's going to turn out that, and I submit the record
9 evidence shows at this point very clearly that this was made
10 the same way. This was printed by somebody -- this was not
11 the fax that City Select ever received. This was printed by
12 someone unknown, unidentified, from information that has never
13 been specified in this case. And, quote, unquote, if there is
14 really evidence of that, the Court doesn't have it in this
15 case. And that's what I would like to address in my next --

16 THE COURT: Well, the complaint didn't specify that
17 that was the fax received by City Select in so many words, did
18 it? I thought it specified this is a copy of the fax that was
19 sent in these mass faxings.

20 MR. FITZPATRICK: And that assertion has to be made
21 by the named plaintiff.

22 THE COURT: Well, the plaintiff wouldn't know what
23 was sent.

24 MR. FITZPATRICK: Sure he would. It's the plaintiff
25 that has the complaint. It's the plaintiff that says I

1 received this and I didn't want it, it was unwanted,
2 unsolicited and I had no prior business relationship, that's
3 what the statute requires. In fact, this is entirely
4 concocted by attorneys with no possibility of the plaintiff
5 ever attesting that it received this fax.

6 THE COURT: But receipt doesn't seem to be a
7 necessary element to the statute, does it? I thought that the
8 statute addressed those that were sent unsolicited to ones
9 that didn't have a prior relationship. It's the sending, in
10 other words, that completes the picture, it is not receipt.

11 MR. FITZPATRICK: No, it's not, that is a
12 misconception that the plaintiffs acidulously argue
13 everywhere they can, but the courts have not accepted that.
14 Because it's sending -- it is manifestly not unlawful to send
15 a fax, it's only unlawful to send a fax if there's no prior
16 business relationship, it's unwanted, and it doesn't contain
17 the statutory disclosure. So the fact that --

18 Plaintiff's counsel also like to mistakenly argue that
19 this is a strict liability statute and meaning there's no
20 defense. Sure there's defense, there's those three defenses
21 that I just specified. Those defenses require the plaintiff
22 to make a showing that it actually received the faxes because
23 he's going to have to say it was unwanted, there was no prior
24 business relationship. Those are the elements of the cause of
25 action and they necessarily require a showing that the fax was

1 received.

2 And my argument is that the complaint is very artfully
3 drawn in order to avoid the consequences of this very issue.
4 But my argument is that there is no legitimate complaint if
5 the plaintiff cannot make the showing required by the statute.
6 And that if even the named plaintiff cannot attest that it
7 received this and is not aware if it received it, then it's
8 complete perversion of the statute to permit this class
9 complaint to go forward. Necessarily the plaintiff's
10 complaint, City Select's complaint that it allowed its name to
11 become attached to and the fax that it allowed in there and
12 the claims in there necessarily constitute an attestation that
13 it received this fax. And if that's not the case, then my
14 view is it's an unconstitutional application of this statute
15 under these circumstances.

16 THE COURT: Has the deposition of the proposed class
17 representative been taken yet?

18 MR. FITZPATRICK: No, sir.

19 THE COURT: Wouldn't that have resolved this issue
20 about whether they received it or how they were solicited and
21 all that?

22 MR. FITZPATRICK: It will resolve the issue,
23 certainly.

24 THE COURT: But if it hasn't been done by now, am I
25 to speculate there's going to be some problem in the future?

1 MR. FITZPATRICK: This is the first thing that we --
2 the first element of discovery that we did in the underlying
3 case when we were able to do it. And, as soon as we did that,
4 as soon as it was revealed that they didn't create this, they
5 just received the solicitation, they said, yeah, it's free
6 money, they're being promised free money.

7 THE COURT: But what if the class representative says
8 I remember receiving this, I didn't save a copy, it went in
9 the trash, isn't that quite feasible?

10 MR. FITZPATRICK: It's quite feasible, especially if
11 that's -- six years later, he knows what to say. It's quite
12 feasible and that would resolve it. But I --

13 THE COURT: But your client seems to have no
14 suggestion that a fax like this wasn't sent or this list was
15 bogus and that this City Select couldn't have gotten it.

16 MR. FITZPATRICK: I'm sorry, I didn't get that.

17 THE COURT: Your client -- City Select says that it
18 should be the plaintiff, that it should be the class
19 representation and that it has a good cause of action. If it
20 were doubtful that this fax were sent to City Select or if it
21 were doubtful that a fax of this type were sent to anybody,
22 you said it's doctored or it's manufactured, isn't your client
23 in a great position to tell me that today and say we have a
24 record of what was sent on behalf of our clients and this
25 isn't there, no such thing was sent, or this list is totally

1 bogus, there's not 29,000 recipients?

2 MR. FITZPATRICK: The factual background of this case
3 is my client has no idea. My client, from the record
4 evidence, hired what it believed to be a legitimate
5 advertising company to make a legitimate advertising campaign
6 with what they had every reason and expectation to believe was
7 lawful information. And we still don't know that that wasn't
8 true, there's not one shred of evidence in this case that
9 indicates that wasn't true.

10 THE COURT: Well, for instance, was there billing?
11 Did your client pay bills to B2B saying you're being billed
12 for X thousands of faxes? I think I saw that in the record.

13 MR. FITZPATRICK: Yes, they did hire B2B, but they
14 did not know that B2B was allegedly carrying out the campaign
15 that it solicited in an unlawful manner.

16 THE COURT: That may speak to the third-party claim
17 that your client has against it. But in terms of the
18 integrity of this fax, you used very strong language, you said
19 it was manufactured by the attorneys --

20 MR. FITZPATRICK: It was.

21 THE COURT: -- because it lacked a header.

22 MR. FITZPATRICK: It didn't come from City Select, I
23 can assure you of that. This did not come from City Select.
24 This came from somebody using something, whether it was the
25 hard drive, whether it was in DVD's that they've talked about,

1 something. This came wholesale from somebody other than City
2 Select. They were told, just as Brian Kelly told the prior
3 named plaintiff, they were told you received these faxes.
4 Kelly sent them to faxes and I'm certain that's what we're
5 going to find happened in this case.

6 THE COURT: If we do, wouldn't the case not be
7 subject to a good summary judgment motion?

8 MR. FITZPATRICK: Yes.

9 THE COURT: I mean, if your interpretation of the
10 statute is correct and they're not able to prove that they
11 received it?

12 MR. FITZPATRICK: But at this point it's the
13 plaintiff's burden to show by a preponderance of admissible
14 evidence that the Court has a good faith basis for certifying
15 the class. This is not an inconsequential order that would
16 result especially based upon the allegations of the number of
17 faxes involved in this.

18 So I don't mean to beat any point that your Honor has
19 already thought about, but if I could just address my other
20 points I'd like to strongly bring to your attention --

21 THE COURT: Sure.

22 MR. FITZPATRICK: -- before I get off the appearance
23 of impropriety.

24 Mr. Wanca also, as I pointed out to the Court, as a
25 matter of record, sent Caroline Abraham a \$5,000 check to her

1 attorney, which her attorney himself viewed as an attempted
2 payoff involving the subject declaration, which she
3 subsequently gave, which counsel for the plaintiff has
4 contended is the evidence that will permit your Honor to grant
5 this motion for class certification. It's a huge appearance
6 of impropriety. It can't be glossed over. It can't be
7 minimized. The very recipient sent it back and said he
8 resented it and he said he considered it to be a payoff. And
9 as I pointed out, no experienced attorney could reasonably
10 believe that sending \$5,000 to that woman under these
11 circumstances, which was not for -- not accompanied by a
12 subpoena and she was a fact witness, no experienced attorney
13 could believe that that was not improper. All of these acts
14 occurred and are known to Mr. Milstein and Mr. Lewis and we
15 submit that they create, aside from the direct impropriety,
16 the appearance of impropriety that's so strong that it
17 prohibits the Court from making the finding that it must make
18 as to that aspect of Rule 23.

19 There's one other, as to adequacy of counsel, one other
20 point that I wanted to raise is that in the *Winter's*
21 litigation Mr. Milstein moved for *pro hac vice* admission of
22 Ryan Kelly when he clearly knew that Ryan Kelly was now
23 subject to be deposed as a material witness in that case.

24 THE COURT: Your argument, though, assumes that that
25 would put Mr. Kelly automatically off limits as a witness.

1 MR. FITZPATRICK: No, what I'm arguing now is to
2 adequacy of counsel, Mr. Milstein is now only counsel of
3 record.

4 THE COURT: No, but you're accusing Mr. Milstein of
5 having the tactic in mind that if he would just sign up
6 Mr. Kelly as co-counsel, that no one would have to worry about
7 Mr. Kelly giving a deposition, is that right?

8 MR. FITZPATRICK: Yes, sir. Even if it wasn't a
9 tactic, he knew at that point, he must have known that Ryan
10 Kelly could never be admitted in this case because he was
11 subject to be deposed, he was a material witness. So if he
12 didn't understand Rule 3.7, he should have. He's not adequate
13 counsel if he did not understand. And I really -- I don't
14 need to go into his motives or explore his motives, but I'm
15 just saying that it's an appearance of impropriety, it's an
16 appearance of inadequate understanding at a minimum by the
17 attorney who proposes to be class counsel in this case. I
18 think there's, to go back to your Honor's question of
19 Mr. Lewis, I just think the interconnections, the record
20 interconnections among these attorneys are so close and so
21 admittedly close that it creates a fatal appearance of
22 impropriety.

23 There's an additional problem with the proposed
24 representation by the class attorneys, which I've noted in my
25 brief. They previously assisted Caroline Abraham against the

1 interests of the putative class members, their putative
2 clients in defeating a motion to add her as a third-party
3 defendant in a class case. They made the same motion on this
4 record in this case. We served Caroline Abraham and her son
5 as third-party defendants and Mr. Milstein, who does not
6 represent them and could not possibly represent them, filed a
7 motion opposing it. Under no circumstances can that be
8 considered a legitimate motion. They are acting against the
9 interests of their own putative class. This woman has -- by
10 all accounts was responsible for masterminding this whole fax
11 advertising solicitation and everything that resulted from it,
12 the only reason they're trying to keep her out is because for
13 the same record reasons that we showed, the communications
14 between her and Mr. Kelly, the promises, the promises of
15 keeping them out of the case if she would comply with their
16 wishes and say what they wanted, that's an appearance of
17 impropriety. And that leads to the next argument.

18 THE COURT: But would it be good to get to the bottom
19 of that before there is class certification?

20 MR. FITZPATRICK: Yes.

21 THE COURT: And there was a period of class
22 certification discovery in this case, wasn't there?

23 MR. FITZPATRICK: No, sir.

24 THE COURT: So the motion was filed and -- let me
25 check the docket.

1 MR. FITZPATRICK: We just have --

2 THE COURT: I'm just wondering, I'm not holding this,
3 but is this motion premature? Should Caroline Abraham be
4 deposed to get to the bottom of this? Should the class
5 representative be deposed to get to the bottom of the
6 solicitation and whether he's going to be able to say that he
7 actually received this fax? And then we could start over or
8 it might at that point, if everything is hunky-dory, even be a
9 consent or stipulation to class certification. But if not,
10 then it could be litigated based on a fuller record.

11 MR. FITZPATRICK: Yes, sir. I believe that is
12 required in the event that your Honor does not find that what
13 the plaintiff's counsel has presented to you is deficient as a
14 matter of law. If your Honor -- in our view if your Honor is
15 inclined to do anything other than the deny the motion for
16 class certification, discovery has to be taken, and so it
17 should be suspended and discovery should be taken on these
18 issues. We just feel that -- they've presented you with a
19 motion, we've responded, and we don't think on their motion,
20 on the record of it it can ever go forward. We don't think
21 this further discovery is required to determine that. But if
22 your Honor feels otherwise, certainly discovery is absolutely
23 required.

24 But they came forward to you and said there's a
25 preponderance of evidence in this case, record evidence that

1 requires you to grant class certification. And what do they
2 say it is? Not any affidavit from anybody, because there's
3 none before you. A certification by Caroline Abraham that is
4 facially deficient, utterly suspect, and under no one's
5 wildest dreams could that declaration be admissible evidence
6 at trial. That is not a B2B business record. The record
7 evidence shows that it is a litigation prop that was drafted
8 by Anderson & Wanca attorneys, sent to her and she was told to
9 sign it. She then, as I detailed in my brief, she asked for a
10 payment of \$1,250 for her services. Then she asked Mr. Kelly,
11 well, which one of those devices contains the information that
12 you're asking me about in this certification? And Kelly wrote
13 her back and told her that's not a B2B business record. Never
14 would be admissible. It was concocted clearly by Mr. Kelly
15 and Anderson & Wanca attorneys. So on its face that can't
16 constitute admissible evidence for your Honor.

17 The only other piece that they say constitutes
18 admissible evidence is the, quote, unquote, expert report of
19 Mr. Biggerstaff. Mr. Biggerstaff's report on its face says
20 that it was derived from information given to him by Ryan
21 Kelly. Not from any examination of the subject hard drive,
22 information from Ryan Kelly. No one knows what that
23 information is. It's not a matter of record in this case.
24 There's no chain of custody information. It's deficient as a
25 matter of law. The two pillars on which they rest this motion

1 cannot possibly constitute the preponderance of evidence
2 required to make a Rule 23 decision.

3 And I want to point out something else about
4 Mr. Biggerstaff's report. In their reply memo they attached
5 another letter from Mr. Biggerstaff in which he says that he
6 has gone beyond his 2009 report and identified actual
7 recipients of these alleged faxes, and he says that that's
8 attached to his report as an exhibit and counsel has so
9 represented in their motion and in their arguments. In fact
10 no such attachment is contained in Mr. Biggerstaff's
11 supplemental letter and no such attachment was filed with the
12 Court. His report is admittedly not based on any examination
13 or review of the subject hard drive. It gives the Court no
14 certainty or even idea where the information came from because
15 Ryan Kelly is not before this Court. And, as you heard
16 Mr. Lewis state in response to your Honor's questions, they're
17 trying to keep him out of the case, anyway, but he's a
18 material witness. He clearly was in possession of the subject
19 hard drive at the time that Caroline Abraham was asked to sign
20 the declaration that he and/or other Anderson & Wanca
21 attorneys gave her. This case can't go forward without an
22 elemental chain of custody proof especially because, as your
23 Honor knows, the subject fax in this case and the earlier case
24 didn't come from the alleged recipient.

25 I made other arguments as to -- I just want to point

1 out that under any circumstances as well what has been called
2 the expert report by Mr. Biggerstaff could never qualify as
3 such under the rules of civil procedure. There's not one
4 statement made in that report to a reasonable degree of
5 scientific certainty, not one.

6 THE COURT: Well, I didn't think it was propounded as
7 an expert report for purposes of trial, again that opportunity
8 will come later if the case survives, but that it suggests
9 that the plaintiffs will be able to prove the contents of the
10 computer data when the time comes. So that if there's any
11 question about the plaintiff's sources of information or
12 ability to prove what was sent out that, during the course of
13 the litigation, the plaintiffs will be able to prove it even
14 if they can't prove it based upon the four corners of that
15 report. I don't think that it's furnished as an expert
16 report, it's furnished as information that supports or tries
17 to support the motion, the class certification motion. Again,
18 it's not a summary judgment motion in which they'd be required
19 to come forward with admissible evidence.

20 MR. FITZPATRICK: Well, they're required to come
21 forward with evidence, reliable evidence upon which this Court
22 could make a factual determination that this putative class
23 actually exists, and I merely point out in response there's no
24 factual foundation for that. And, as well, this is their
25 expert report, this was propounded as their expert report in

1 the prior case and it is not based on anything other than,
2 here's the foundation, here's the foundation for that report.
3 Ryan Kelly. Here's the foundation for Caroline Abraham's
4 affidavit. Ryan Kelly. Where's the hard drive? Where's the
5 underlying facts? Where's the affidavit? Why don't we have
6 an affidavit of Ryan Kelly, he's clearly the party in
7 interest. You're missing -- there's a complete absence of
8 even a veneer of factual evidence sufficient to go forward.
9 By plaintiff's counsel, through dressing that up as an expert
10 report and saying we believe that we'll be able to show that,
11 yes, that's a legal argument made by plaintiff's counsel who
12 have every interest in making that legal argument, but it's
13 not a factual attestation, it's not an affidavit.

14 THE COURT: Well, is there something in Rule 23 that
15 required them to submit an affidavit? There are plenty of
16 cases that make reference to affidavits being received, but
17 I'm not aware of any that rejected a class certification
18 motion simply for lack of an affidavit.

19 MR. FITZPATRICK: No, I'm not saying that as a
20 general rule. I'm just saying that under these circumstances,
21 which are very unique, we don't have a real plaintiff here, we
22 don't have a real complaining witness. In the ordinary course
23 if someone brings any motion in front of your Honor that
24 represents facts not of record, it has to be accompanied by
25 some type of verification, an attorney affidavit, a party

1 affidavit. There are factual representations that have been
2 made very, very, very loosely by counsel for the plaintiffs in
3 the motions that have been filed -- in all the matters that
4 have been filed of record in this case so far that aren't
5 supported and in many cases can't be supported by anyone who
6 actually knows the facts. So all I'm suggesting is that not
7 that Rule 23 requires that, but Rule 23 requires the Court to
8 make specific findings as to each of the elements based upon
9 reliable admissible evidence, and what you've been presented
10 is on its face not reliable, highly suspect, and not
11 admissible.

12 So our argument is there's a complete deficiency of the
13 required showing in order to obtain the requested motion for
14 class action certification and the proper response is
15 therefore to deny it, not to try to give them every next
16 chance they can but to deny it. They had not only the year
17 that this case has been going on but three years prior to do
18 this and this is what they decided to present to your Honor
19 today and they contend that it's sufficient. We contend that
20 it's not and that it should be dismissed on that basis.

21 The other thing I want to point out is, your Honor
22 yourself raised this in questions to Mr. Lewis, and that is
23 the definition, the proposed definition of the class. That's
24 not a proper definition of the class as my brief indicates.
25 It does require the additional elements that your Honor

1 suggested. And it requires one more, it requires the concept
2 of -- the language, the proposed language is to any person who
3 was sent, the proper language is to any person who received
4 that fax. It is not a proper statement of the proposed class
5 to state was sent, received is proper, and the *Local Baking*
6 case that's cited in my brief indicates that. And in that
7 case -- I also note that that was -- Mr. Bock was counsel of
8 record for the plaintiff, putative class in that case and made
9 quite a different requested class action definition. So, as
10 written, it doesn't comport with the statutory elements, it
11 would necessarily put the cart before the horse and preclude
12 statutory defenses.

13 Lastly, I need to point out to the Court that the Third
14 Circuit has an additional required review as to this
15 particular statute, the TCPA, which was indicated in a recent
16 holding in the case of *Landsman & Funk vs. Skinder-Strauss*
17 *Associates* last April 2012 U.S. App. LEXIS 11946, in that case
18 the court -- and I have copies for the Court, as well.

19 May I?

20 THE COURT: Yes. Thank you.

21 (Hands up document)

22 MR. FITZPATRICK: In that Third Circuit case the
23 court remanded to the district court, it was a TCPA case, and
24 said -- well, the first issue is *Mims* -- the Supreme Court
25 case of *Mims vs. Arrow Financial* decided the jurisdictional

1 question of whether federal courts have jurisdiction over
2 these putative cases in the first place by saying federal and
3 state court have concurrent jurisdiction. But the Third
4 Circuit said there's another required element of the analysis
5 and remanded in that case for the court to do it. It said
6 "These consolidated cases are hereby remanded to the district
7 court for resolution of the effect of Section 227(b)(3) if
8 otherwise permitted by laws or rules of court of a state.
9 Language has on such federal TCPA actions, i.e., whether it
10 subjects such actions to state law limitations that would
11 apply to similar suites filed in state court and, if so, which
12 ones. The district court should reconsider the issue in light
13 of *Mims* and *Shady Grove Orthopedic Associates*." And I'll
14 eliminate the cite.

15 That Third Circuit is there saying that in these TCPA
16 cases, as to the question of, that we're now presented with
17 here today, is it appropriate for class action, you have to
18 look to the underlying state law. That analysis requires the
19 Court to deny the motion for class action certification
20 because New Jersey has directly held that class action
21 treatment of TCPA cases is not warranted and not permitted
22 under New Jersey law. So under the required analysis that the
23 Third Circuit, as specified in that case, this case could
24 never pass muster for class action treatment, anyway.

25 Denial of the motion for class action will not work any

1 substantive harm on any putative plaintiff. I made that point
2 in my brief and made the citations. This Court has already
3 ruled that the statute of limitations is tolled as to any of
4 those putative plaintiffs cases. And, as the New Jersey court
5 in *Local Baking* specifically held, the TCPA is not a superior
6 vehicle for the resolution of these claims. In fact, the
7 putative plaintiffs would all end up in a much better position
8 by going to small claims court and filing their claims on
9 their own than they would by allowing them to be handled on a
10 class certification basis. So denial of the motion would not
11 work any substantive harm to any member of this putative
12 class.

13 THE COURT: How would it be superior to 29,000
14 superior court cases rather than one class action?

15 MR. FITZPATRICK: Because as the courts pointed out
16 in that case and others cited in my brief, the determination
17 of the membership in this putative class necessarily involves
18 an individualized inquiry that is exactly the same inquiry
19 that would be required on the merits. Did you receive a fax?
20 Was it unwanted? Did you have a prior business relationship
21 with the sender? Did you voluntarily make your information
22 publicly available on the Internet, through a directory
23 through which this number was obtained? The courts have
24 reiterated that that individualized analysis is required at
25 the class certification stage, and there's no superiority

1 whatsoever in doing that in a class action setting than in an
2 individualized setting.

3 THE COURT: But couldn't class members in a certified
4 class return a questionnaire that would make them either
5 eligible or ineligible to participate in any recovery?

6 MR. FITZPATRICK: Could they respond by means of a
7 certified rather than under oath? I don't --

8 THE COURT: No, there are some questions that someone
9 would have to answer in order to actually be a member of this
10 class, they would have to have had no prior business
11 relationship, they would have to have had an unsolicited
12 exchange here, and they could be asked those questions as part
13 of the class action. That there may be distinctions between
14 individuals that turn on the answers to a couple simple
15 questions, I'm not sure that defeats the superiority when the
16 numbers are so large otherwise. The prospect that people are
17 actually going to go into municipal court is nil, isn't it?

18 MR. FITZPATRICK: Not according to what the
19 legislature thought when they created this statute. As many
20 of the courts -- and many of the courts and the New Jersey
21 courts in particular have held that it was created to be a
22 superior remedy with a relatively low legal threshold, i.e.,
23 small claims, and relatively high statutory penalty for what
24 the courts have found is a very slight nuisance. So for a
25 slight nuisance you can get \$500 by walking in on your own,

1 you can walk out with the judgment on the same day. And they
2 have found it -- I wouldn't exclude the possibility of
3 something like, your Honor, a device in a class action case,
4 many such devices are used in various cases and, you know, I'm
5 certain something could be fashioned in this case, but I agree
6 with the courts that have stated and concluded that this is
7 not a superior mechanism for adjudication of these claims.

8 We really appreciate your Honor's attention.

9 THE COURT: Well, a couple more questions.

10 MR. FITZPATRICK: Sure.

11 THE COURT: Is it not necessary to the parties then
12 to brief New Jersey law? Is that something that the Third
13 Circuit en banc has, you know, required in the *Landsman & Funk*
14 case?

15 MR. FITZPATRICK: I think I briefed enough of it,
16 that's what's out there, that's the requirement. It's our
17 circuit. It's a one paragraph statement, it's not subject
18 to -- it's not ambivalent. I don't know that there would be
19 anything else. They just said that in light of *Mims*, under
20 this TCPA, you're required to look to state law. And state
21 law, that's a definitive statement of state law in our view.
22 But if your Honor wishes to get supplemental briefs, we'll be
23 happy to do it.

24 THE COURT: Well, what is a state court case that
25 says a class action can be maintained under the TCPA?

1 MR. FITZPATRICK: *Local Baking*, it's in my brief.

2 THE COURT: Okay. What's the name of it again?

3 MR. FITZPATRICK: I'll give it to you. *Local Baking*
4 *Products, Inc. vs. Kosher Bagel Munch, Inc.*, 2011 New Jersey
5 Super. LEXIS 143.

6 THE COURT: I'm familiar with that. That's an
7 unpublished case, isn't it, or non-precedential case?

8 MR. FITZPATRICK: No, sir, I don't think so. They
9 cited non-precedential cases that were therein. I may be
10 wrong but I don't think so. This was the case that -- but
11 again, we'll be happy to brief that issue if your Honor
12 wishes.

13 THE COURT: All right. We'll get back to that then
14 in a minute.

15 Okay. Let me turn back to Mr. Lewis.

16 Thank you, Mr. Fitzpatrick.

17 MR. FITZPATRICK: Thank you.

18 MR. LEWIS: I'll start right there, your Honor. *Mims*
19 couldn't be more clear that federal law controls the federal
20 TCPA. And the *Landsman vs. Funk* [sic] case, 640 F.3d 72,
21 specifically says that "although individual actions under TCPA
22 may be easier to bring in small claims court than other types
23 of cases, that does not necessarily undermine the greater
24 efficiency of adjudicating disputes involving 10,000 faxes in
25 a single class action. Indeed, as plaintiffs point out, we

1 have little reason to believe that individual actions are
2 automatically sufficient, plaintiffs can still face protected
3 litigation when they sue individually." That was the Third
4 Circuit's statement on the issue of superiority.

5 I've got quite a few points in rebuttal, your Honor.
6 The very -- when defense counsel started out, he pointed to
7 Exhibit F to the reply brief. It was not Exhibit F to the
8 reply brief, the marketing letter that Anderson & Wanca used,
9 it was actually Exhibit F to Professor Richard Painter's
10 opinion that we have submitted in this case. And it is
11 Professor Painter's opinion that the marketing letter that was
12 sent by Anderson & Wanca was not -- did not violate the
13 professional Rules of Professional Conduct.

14 Mr. Fitzpatrick said that all these courts have found
15 that the marketing letter is deceptive, that's completely
16 untrue. Judge Gettleman didn't like the letter that was
17 submitted in *Creative vs. Ashford*, but the letter in this case
18 is significantly different than the letter than the letter in
19 the *Creative vs. Ashford* case. In this case the letter states
20 that "During our investigation, we have determined that you
21 are likely to be a class member in one or more of the cases we
22 are pursuing." It specifically uses the words "solicitation
23 letter" on the bottom. The *Creative Montessori* letter said
24 "During our investigation, we have determined that you are
25 likely to be a member of the class." That language is much

1 different. There's no evidence in this case that any of the
2 29,113 persons that are in the putative class were deceived in
3 any possible way by any marketing letter.

4 Mr. Fitzpatrick said that the attorneys were referred
5 to the Bar as a consequence of the letter. That is absolutely
6 100 percent false. I can produce a transcript from Judge
7 Gettleman at the end of the very first class certification
8 hearing when he certified the class, where he specifically
9 said, well, this is great, I'm glad you cleared everything up.
10 I didn't want anybody to have any trouble with the Bar. Those
11 are almost exact quotes, your Honor. So, Mr. Fitzpatrick,
12 you're playing a little too fast and loose there.

13 Mr. Fitzpatrick says that I have no class action
14 experience. The CV that was submitted did not have a lot of
15 my background. The fact of the matter is that I have 15 years
16 of class action experience. I also have less hair than any of
17 the attorneys in the room. I have lots of class action
18 experience, your Honor. Mr. Milstein, he is one of the most
19 experienced counsel in the whole area. We are absolutely
20 adequate and equipped to take these cases to trial. We have
21 tried the *CE vs. Cy's Crabhouse* case. After two days of
22 trial, that class -- that case was settled in favor of the
23 class. We have won summary judgments, your Honor.

24 Mr. Fitzpatrick -- this is a light switch case, your
25 Honor. And that is the reason why we have been attacked by

1 the defendant so vigorously in this case is because if we go
2 away, then the case goes away and it's pretty much that
3 simple.

4 In the model Rules of Professional Conduct, your Honor,
5 if you go to the ABA, the Preamble, Section 20, it's very
6 instructive. It states --

7 THE COURT: Section 20?

8 MR. LEWIS: Yes, of the Preamble of the ABA Rules of
9 Professional Conduct, the model rules. It states, "Violation
10 of a rule should not itself give rise to a cause of action
11 against a lawyer nor should it create any presumption in such
12 a case that a legal duty has been breached." It goes on, "The
13 rules are designed to provide guidance to lawyers and to
14 provide a structure for regulating conduct through
15 disciplinary agencies, they are not designed to be a basis for
16 civil liability. Furthermore, the purpose of the rules can be
17 subverted when they are invoked by opposing parties as
18 procedural weapons. The fact that a rule is a just basis for
19 a lawyer's self-assessment or for sanctioning a lawyer under
20 the administration of a disciplinary authority does not imply
21 that an antagonist in a collateral proceeding or transaction
22 has standing to seek enforcement of the rule."

23 You've heard a lot today about what the defendant
24 believes was misconduct by Mr. Kelly and the Anderson & Wanca
25 firm, but we have submitted at least eight cases now, your

1 Honor, where all of these issues have come up after the
2 Seventh Circuit decision came down last November and every
3 single court has found that there was no misconduct. The
4 misconduct that Ms. Abraham has cited and defense cites in
5 this case, Judge Gettleman in the *Creative vs. Ashford* case on
6 remand termed those allegations as "pure sophistry."

7 The computer data that is at issue in this case was
8 produced by the Abrahams' attorney, it was produced by Joel
9 Abraham after he was under force of subpoena under a records
10 and deposition subpoena.

11 The defendant has made much here about the use of the
12 term "receipt," the defendant claims that the TCPA itself
13 requires proof of receipt. That's just not true. The TCPA
14 itself -- the language of the TCPA uses the word "send," it
15 does not use the term "receipt." The Georgia Supreme Court
16 just a couple weeks ago came down in an opinion, that we can
17 provide to the Court, that couldn't make it more clear that
18 the issue is whether a fax was sent, not received.

19 The advertisement in this case did come from the hard
20 drive, your Honor, it was attached to the Biggerstaff opinion,
21 it was attached to the complaint. We're not -- we have never
22 said that the advertisement that defense counsel was showing
23 your Honor just earlier was the actual original fax.
24 Everybody throws away these faxes, that's why it's termed the
25 Junk Fax Protection Act, that's why everybody calls them junk

1 faxes, that's why Congress made the law that is the reason why
2 we're here today, so any misconduct that is trying to be
3 attributed to us with regard to that is just wrong.

4 The fact that there isn't a fax header, I can't tell
5 you right off the top of my head because the experts or at
6 least our expert is able to determine this. But there was a
7 time when Ms. Abraham actually had her computers programmed so
8 that no fax header would appear. So Mr. Fitzpatrick's
9 assertion that there is always a fax header is not true, junk
10 faxers are wily, they're crafty, and they can make computers
11 do things to fax machines. But it really doesn't matter
12 because the advertisement, again, from this case on behalf of
13 City Select did come from the hard drive.

14 THE COURT: Well, is that fax, the fax that's in the
15 record, a replica what's on the hard drive?

16 MR. LEWIS: Exact replica, your Honor.

17 THE COURT: So what's on the hard drive, I guess you
18 wouldn't expect would have a fax header, would it?

19 MR. LEWIS: Exactly, your Honor, it would not.

20 THE COURT: So if I were to take a copy of one of my
21 opinions and decide to fax it to somebody, what I retain
22 doesn't have a fax header on it, I retain my opinion whether
23 it's in our computer or whatever.

24 MR. LEWIS: That's exactly right.

25 THE COURT: I didn't have doubt about it before, but

1 you're now making it crystal clear that that fax that's
2 attached to the complaint and that's referred to throughout
3 the matter is not a copy of what the plaintiff is saying he
4 received, it's a copy of what the plaintiff is saying or that
5 you're saying on behalf of the plaintiff that the defendant
6 through its agent sent.

7 MR. LEWIS: Absolutely, your Honor. And the
8 plaintiff, vis-a-vis that proof, can prove the entire case for
9 everyone else. There may not be a soul on earth that still
10 has one of those 44,000 plus junk faxes that were sent in this
11 case, that's how these cases work. Congress did not use the
12 term receipt possibly for that reason.

13 THE COURT: Well, have you met with or someone in
14 your firm met with City Select?

15 MR. LEWIS: I have not, your Honor.

16 THE COURT: Do you know what City Select would say
17 through their 30(b)(6) witness about whether they, you know,
18 received this fax, whether they had a business relationship,
19 and all that sort of thing?

20 MR. LEWIS: I personally do not, your Honor.

21 THE COURT: So how can plaintiff prove this?

22 MR. LEWIS: It is possible that City Select has the
23 fax because we have had other cases where they have had the
24 fax. *Chapman vs. Wagner*, Mr. Chapman was a pack rat, he kept
25 everything, we had the fax. There have been some cases where

1 the actual received fax has been produced. But most of the
2 B2B cases, that's not the case, all of the proof is straight
3 through. *CE vs. Cy's Crabhouse*.

4 THE COURT: Fax machines, in my experience, keep a
5 record of how many pages came in and what transmission on what
6 date and that can go back for that months, if not years. Have
7 you inquired of your client whether they have a record of this
8 sort of transaction being received?

9 MR. LEWIS: Most fax machines do not retain that data
10 unless they have a computer chip, as I understand the
11 technology. We have experts who are far more well versed in
12 these matters than I, but most fax machines you just get the
13 fax and that's it. But you don't need any of that evidence.
14 We have certified over, I think, 10, 11, 12 of these B2B cases
15 in federal courts. We've certified another 13 or so,
16 somewhere between 20 and 25 of these B2B have been certified,
17 almost all of them have been certified based on the evidence
18 that we have brought to your Honor. The other -- these
19 opinions are very persuasive. Mr. Fitzpatrick makes it sound
20 like it would be this great unjust thing that nobody's ever
21 seen before, that this is a clear outlier, but all these cases
22 have been certified basically on this exact type evidence that
23 we've produced to you.

24 Mr. Fitzpatrick never --

25 THE COURT: Well, I'm I think what that

1 Mr. Fitzpatrick is fundamentally arguing is that there's a
2 plaintiff who's indifferent to this cause of action, who
3 didn't come to you, didn't know whether he was actually harmed
4 by this, whether he actually received anything, and was
5 solicited in a questionable manner by an out-of-state
6 attorney, and there's a dispute about whether this was mere
7 advertising material or whether it was a pitch, it says on the
8 bottom of the letter "advertising material." So maybe there
9 are issues presented here that ought to be looked into.

10 MR. LEWIS: Your Honor, it's actually very common in
11 the class action context, and I will give you a couple of
12 examples.

13 THE COURT: I've been doing them for almost 30 years
14 so I have an idea what's out there. And I don't remember this
15 kind of an issue being raised in any case where there was a
16 real concern that there was an improper solicitation and
17 there's not a real plaintiff. I did have one fairly recently
18 where the plaintiff seems to have signed up a lawyer to bring
19 up a class action case before the plaintiff made the purchase
20 which was the subject of the class action and then claimed to
21 be defrauded in the making of the purchase, I have seen that.
22 But --

23 MR. LEWIS: Professor Newberg has noted that attacks
24 on counsel are becoming more and more prevalent in the class
25 action context, and maybe you're seeing that as well.

1 THE COURT: Well, certainly I see a lot of things.

2 MR. LEWIS: I've got a couple more things I have to
3 address, your Honor.

4 THE COURT: What I'm wondering is this, I would
5 rather not certify a class if the plaintiff couldn't survive a
6 summary judgment motion one day, and I'm wondering if this is
7 a case where the class certification should be dismissed
8 without prejudice and that the case would go forward with the
9 discovery of what happened with City Select and how suitable
10 they are to be a class representative, and also some of these
11 other unanswered questions about the admissibility of the
12 evidence that something was sent to City Select. If those
13 questions, and they may just be hobgoblins, you may be right,
14 but if they're clarified, then I think you have a very easy
15 path to victory. If they're not clarified, then we're going
16 to go through this whole class certification, I'll sign a
17 class certification order, let's say, notice goes out to
18 everybody, a lot of expense and everything, and then it turns
19 out that the case implodes on City Select.

20 MR. LEWIS: So are you suggesting --

21 THE COURT: I'm asking the question, I haven't made
22 up my mind, but I'm wondering if this is premature and issues
23 like the deposition of City Select, the deposition of Ryan
24 Kelly, the deposition of Mr. Abraham and his mother
25 Mrs. Abraham, that would be necessary, it seems, to prepare

1 for trial, whether those ought to be done now as preparation
2 for the renewed class certification motion.

3 Any thoughts?

4 MR. LEWIS: We believe that the papers we have
5 submitted are sufficient, but we are fully capable and willing
6 to do whatever your Honor requests.

7 THE COURT: Are you also familiar with cases where
8 class cert have been deferred until some sort of underlying
9 discovery has been taken?

10 MR. LEWIS: That happens on occasion.

11 THE COURT: And this case, I'm sorry it's so old, the
12 last six months are on my watch, it's taken a while to get
13 this case to oral argument. But I am surprised that there
14 hasn't been more exchange outside of the class certification
15 motion, in other words, the taking at least of some sort of
16 class certification discovery by the defendant of the
17 plaintiff. That's one thing that makes me reluctant to stop
18 the clock and give the defendant, you know, some more months
19 on top of the six or nine months that have already existed to
20 gather the evidence.

21 MR. LEWIS: I have a couple more points I need to
22 address.

23 THE COURT: Please.

24 MR. LEWIS: The allegations about the \$5,000 check,
25 again, we have the opinion of Professor Painter who literally

1 wrote the book on legal ethics, they have not come up with any
2 countervailing rebuttal opinion. Numerous courts have studied
3 this issue, have looked over the facts and circumstances
4 regarding the \$5,000 check, and nobody has come to the
5 conclusion, no court has come to the conclusion that we did
6 anything wrong.

7 THE COURT: Do you know what the --

8 MR. LEWIS: Judge Kennelly reviewed it in the *CE* vs.
9 *Cy's Crabhouse* case initially. I'm sorry, your Honor.

10 THE COURT: What was the intention behind the \$5,000
11 check?

12 MR. LEWIS: Well, the words on the bottom of the
13 check in the memo section were "document retrieval." We had
14 been going through this process with Caroline Abraham in
15 numerous cases and both Mr. Wanca and Mr. Kelly submitted
16 affidavits, for example, to the court in the *CE* vs. *Cy's*
17 *Crabhouse* case in front of Judge Kennelly, which we can supply
18 to your Honor, but it was about document retrieval. The
19 ethical rules, when you're dealing with third parties, require
20 that attorneys deal with them fairly and honestly and don't
21 make their lives so burdensome or overly tax them, that they
22 have a right to their reasonable expenses and the costs and
23 time incurred in retrieving documents. Ms. Abraham, in
24 addition to, aside from all of the computer hard drive issues
25 that we talked about today, she also has another set of

1 documents that she, and computer records that she still has at
2 her house, so it takes time for her to retrieve all those
3 records and submit them, sometimes defendants, sometimes us,
4 but in that context -- both her and Joel for a period of time
5 were receiving checks somewhere between 50 and \$100 apiece,
6 and in that context and in the context of there being many
7 more subpoenas coming down the pike and many more cases that
8 were going to be litigated, Mr. Wanca sent a check to
9 Ms. Abraham's attorney Mr. Rubin. Mr. Rubin, of course, was
10 also Ms. Abraham's attorney when she was battling the FTC when
11 she had been accused and ultimately settled, she was the
12 mastermind along with her husband of the largest illegal
13 diploma selling scheme in the history of the world and illegal
14 driver's license scheme. And after the FTC shut her down for
15 those matters, she immediately started junk fax broadcasting,
16 violating our nation's laws doing that. So Mr. Rubin was her
17 attorney during those matters. And now -- well, up to that
18 point Mr. Rubin became her representative with regard to some
19 of the goings on with regard to the junk fax litigation. So
20 that's the general context of the \$5,000 check. Judge
21 Kennelly has reviewed it. Judge Callahan in *Reliable vs.*
22 *McKnight* has reviewed it. We've given you citations to all
23 these cases, court, after court, after court, after court.
24 THE COURT: But if Mr. Rubin himself was offended by
25 it, doesn't that say something?

1 MR. LEWIS: Well, yeah, in the context of Mr. Rubin
2 was her criminal defense attorney, and Mr. Rubin had quite a
3 few different axes to grind himself. In fact our Professor
4 Painter, our expert, specifically said that for, I'm quoting
5 from Document 36-1, Page 11 of Professor Painter's opinion,
6 "For an attorney receiving such a payment to accuse the
7 sending attorney of offering a bribe or other improper payment
8 is an unprofessional delay tactic to avoid complying with
9 discovery requests." Professor Painter issues -- states many
10 other things that explains why this was perfectly appropriate,
11 there was nothing improper about it.

12 Earlier the defendant's counsel stated that there was
13 some sort of connection between the \$5,000 check and the
14 December 28, 2010, declaration, that's absolutely false.
15 There's no -- this check was in June of 2009, the declaration
16 was a year and a half later after we had innumerable disputes
17 in federal courts and state courts around the nation with
18 Ms. Abraham. There has been an adversarial relationship
19 throughout. She's stated over and over again she's on the
20 side of the defendants. She's a hostile witness. I mean, she
21 doesn't like to be brought in as a third party in these cases.

22 THE COURT: Well, was there -- did Mr. Milstein file
23 opposition to a motion to default the third-party defendants?

24 MR. LEWIS: There's a perfectly reasonable
25 explanation for that. We did it in Cy's Crabhouse, we've done

1 it in other cases, we're trying to protect the class, to move
2 things along. These third-party cases against Ms. Abraham,
3 according to Ms. Abraham, she's penniless. Nobody has ever
4 produced any evidence that she has even more than a 2004 Ford
5 Taurus. Now, the government had some very -- were very
6 skeptical about that and in the context of their agreement to
7 settle the illegal driver's license case and the illegal
8 diploma scheme that she was perpetrating, they put in, I
9 think, a five or \$10 million avalanche clause into the case so
10 if the government ever learns that she has any money and has
11 any assets, then they can come and get it, vis-a-vis that
12 avalanche clause.

13 THE COURT: Why not let her default so it doesn't
14 clutter the pleadings?

15 MR. LEWIS: I don't have any problem with defaulting.

16 THE COURT: But you're opposed.

17 MR. LEWIS: We opposed it before because it was
18 slowing the case down. But if she defaults now, there's no
19 slowing the case down. What's done is done, she's defaulted.
20 It doesn't hurt the class, it's done, I have no objection to
21 it.

22 THE COURT: Okay.

23 MR. LEWIS: One final thing about the *Landsman vs.*
24 *Funk* case and defense counsel's wanting this Court to follow
25 New Jersey state law and throw the federal rules out the

1 window. There were also tens of thousands, I don't know the
2 exact number, but thousands and thousands of class members in
3 Pennsylvania, so the people in Pennsylvania are supposed to be
4 subject to New Jersey law in federal court? The argument
5 makes no sense.

6 THE COURT: Well, would the Court apply New Jersey's
7 choice of law as law and determine who's covered by what?

8 MR. LEWIS: No, our opinion -- our view, and the case
9 law supports this, is that the Federal Telephone Consumer
10 Protection Act in federal court, the federal procedural rules
11 and the federal substantive rules are applied in federal
12 court.

13 THE COURT: But what do you make of the section of
14 the TCPA, Section 227(b)(3) that the Third Circuit was dealing
15 with, that there's a condition placed upon the TCPA that it
16 be, if otherwise permitted by laws or rules of court of a
17 state, that language is in the federal statute, so how is that
18 to be applied in our case?

19 MR. LEWIS: It's to be applied in the same way the
20 statute of limitations, the four year statute of limitations
21 is applied, the federal four-year statute is applied, not any
22 type of state statute of limitations. We can brief this as
23 Mr. Fitzpatrick requested.

24 THE COURT: Okay. You can review your notes for a
25 minute and I need to just confer.

1 MR. LEWIS: Yes, your Honor.

2 THE COURT: We need to take about a ten or 15-minute
3 break. Before I ask for supplemental briefing, I want to see
4 if I can track down this *Landsman & Funk* issue. We're aware
5 of the case but not aware of the interpretation that is being
6 placed on it. Is Mr. Fitzpatrick arguing that the case
7 requires compliance with state classification precedents?

8 MR. FITZPATRICK: Yes, sir, I believe that's the only
9 possible reading of the court's remand with specific
10 instructions to the district court to examine whether it
11 subjects such actions to state law limitations that would
12 apply to similar suits filed in state court, I believe that's
13 why that did it. And New Jersey is different from all the
14 states that plaintiff's counsel cited. New Jersey has
15 specifically held that this -- the TCPA does not permit class
16 action treatment under New Jersey law. And that's why I think
17 the district court made this clear, because the statute itself
18 has this "if otherwise permitted by laws or rules of a court
19 of a state," and that analysis necessarily leads this Court, I
20 believe, to conclude, well, this case was brought in New
21 Jersey and, under the TCPA, and the Third Circuit requires us
22 to make this analysis, we look to state law. State law is
23 specific on this, it has addressed the issue, it says these
24 cases are not appropriate, therefore, we don't have a basis
25 for applying for permitting it to be handled as a class action

1 matter in this court. I think it emits of no other reading.

2 THE COURT: And, Mr. Lewis, anything else before we
3 take a short break?

4 MR. LEWIS: No, your Honor.

5 THE COURT: Let's take a break until about 3:20 and
6 then we'll resume.

7 MR. FITZPATRICK: Thank you, sir.

8 (Brief Recess.)

9 DEPUTY CLERK: All rise.

10 THE COURT: Okay. Be seated, please.

11 Thanks for your patience. I wanted to take that time
12 to revisit the Third Circuit's decision in its remand of
13 *Landsman & Funk*, and this is a development that occurred while
14 the briefing of this motion was underway but hasn't been
15 addressed by the plaintiff. The issue in *Landsman & Funk*,
16 which was remanded to Judge Hayden and which she, to my
17 knowledge, has not yet addressed other than in a motion that
18 denied consolidation of similar cases, is the issue raised by
19 the private right of action statute that gives rise to
20 jurisdiction as interpreted by the *Mims* decision of the
21 Supreme Court, and that section is 47, United States Code,
22 Section 227(b)(3)(B), and that reads: "Private Right of Cause
23 of Action. A person or entity may, if otherwise permitted by
24 the laws or rules of court of a state, bring in an appropriate
25 court of that State," dropping down to B, "an action to

1 recover for actual monetary loss from such a violation or to
2 receive \$500 in damages for each such violation, whichever is
3 greater."

4 And the question remanded, as identified by the Third
5 Circuit, is whether the TCPA subjects class actions that are
6 filed in federal court to the laws and court rules of the
7 state in which they're filed and, if so, which ones. And that
8 apparently is due to the gloss that the federal court,
9 including the Supreme Court, have placed on the jurisdictional
10 statute which permits the bringing of a TCPA case in state
11 court but is silent as being able to bring it in federal
12 court.

13 I'm uncomfortable going ahead with this class
14 certification motion at the present time. I'm going to
15 dismiss it without prejudice to its renewal. I want to give
16 the parties time to do two things; first, to complete
17 discovery that would shed light upon the class action or the
18 class certification issues that have arisen during this
19 briefing, especially the adequacy of the named plaintiff, the
20 class representative and, secondly, as to the admissibility of
21 what should be the key piece of evidence in the case, which is
22 the computer data, but, most importantly, to determine whether
23 this Court has to apply state class action law in determining
24 whether this case should be certified.

25 This may be a unique issue in light of all the federal

1 courts that have certified such classes, but it does come
2 after the Third Circuit's remand in a case that appears to be
3 on point in raising these questions. And New Jersey law has
4 only three decisions that I've been able to find so far that
5 address whether a class action can be maintained or at least
6 whether this particular class action in those cases could be
7 maintained for the violation of this type under the TCPA.
8 And, of course, the one which is quite persuasive is Judge
9 Carchman's case on behalf of the Appellate Division in *Local*
10 *Baking Products, Inc., vs. Kosher Bagel Munch, Inc.*, 421 N.J.
11 Super. 268, decided by the App. Div. on July 19, 2011, Cert.
12 was denied by the New Jersey Supreme Court in September of
13 2011. And Judge Carchman cites to unreported decisions that
14 had reached similar conclusions about the non-certifiability
15 of a TCPA class of this sort because of the issues of
16 superiority and I think it was predominance, and that had to
17 do with the need to determine, in his view, or rather in the
18 panel's view, the consent or lack of consent of each
19 recipient.

20 If I'm bound by that, it may be dispositive of the
21 ability ever to certify a class in this case. If I'm not
22 bound by it but I'm to apply Rule 23 and federal procedural
23 law, then I think that the plaintiffs have presented a fair
24 question that requires my adjudication just like any other
25 class certification motion does. And, frankly, until the

1 importance of the *Landsman & Funk* case was brought to my
2 attention this afternoon, I was probably leaning more toward
3 granting certification but now I can't. And I think that the
4 better thing is to start over, to have a short period of
5 discovery, which I'm capping at 60 days, and it will be up to
6 the parties to work out a plan for reasonable discovery in aid
7 of class certification. I'm really interested in getting at
8 what this plaintiff did, what they knew, what records they
9 have, what their purpose is in seeking to be the class
10 representative, in other words, typical class representative
11 discovery because ultimately I need to determine if the
12 plaintiff is a suitable class representative whether it's
13 under federal law or state law.

14 So I'm, frankly, a little disappointed, an awful lot of
15 work has gone into this already. I know you're disappointed,
16 you've waited a long time for today for a decision, but I'd
17 rather make the right decision than the wrong one. But you're
18 not going to have to necessarily refile everything that you've
19 filed already, you can make reference to it in your future
20 briefing. I'm not trying to make your work more difficult but
21 it gives you a chance, and the plaintiff has the burden, to
22 establish what the law is to be applied and to apply it in a
23 way that persuades the Court to certify the class. And if
24 that can be done, we'll have a certified class; if it can't,
25 then we won't.

1 Are there any questions about what I've said so far?

2 MR. LEWIS: Yes, your Honor.

3 THE COURT: Okay.

4 MR. LEWIS: Would you like the *Landsman* briefing, I
5 guess what I will call the *Landsman* briefing to begin
6 immediately?

7 THE COURT: Would that be helpful to the parties or
8 would you rather wait until you see how your discovery pans
9 out?

10 MR. LEWIS: We think the law is pretty clear, you may
11 file it in state court but that doesn't preclude filing it in
12 federal court. And we believe that the TCPA, federal TCPA
13 applies not state law procedure rules, we don't.

14 THE COURT: Why would the Third Circuit then have
15 remanded on that issue? I mean, it's clear that a TCPA can be
16 filed in federal court. If I'm reading the *en banc* remand
17 properly, the Third Circuit wasn't prepared to decide what
18 rules apply or what law even applies beyond the TCPA. So
19 there might be two hurdles to jump through statutorily, one is
20 what's in the TCPA and the other is whatever is in state law,
21 including the court rules that would color the right to
22 maintain such an action. And perhaps if one gets through both
23 hoops, then you have a successful federal court suit. But
24 it's something that I want to give the parties an opportunity
25 to brief.

1 If state law were more permissive of this sort of class
2 action, then this would be an interesting question but not a
3 show stopper. But what I'm seeing under New Jersey state
4 court decisions is that this sort of class action is either
5 strongly disfavored because of the problems identified in
6 Judge Carchman's opinion or even prohibited.

7 MR. LEWIS: I don't know if *Landsman*, your Honor,
8 applied to persons in one state or in multiple states. In
9 this case we've got persons in, at a minimum in Philadelphia,
10 in Pennsylvania and New Jersey, at least two states are
11 implicated, maybe more, so that might be a differentiating
12 factor.

13 But putting that aside, it's plaintiff's position that
14 we should start the briefing -- we would like to start the
15 briefing, your Honor, now and we could do an opening class
16 brief on this issue -- an opening brief rather on this issue
17 and he could have time to respond and we could have time to
18 reply.

19 THE COURT: I think that makes sense.

20 Mr. Fitzpatrick, what I'm considering is this, that the
21 pending motion be dismissed without prejudice, that plaintiffs
22 would have whatever time they need, maybe 30 days to file an
23 opening brief for class certification accompanied by their
24 views of the *Landsman* issue and how it should play out. You
25 would then have additional time, more than the normal time

1 before your opposition is due, maybe another 60 days from
2 then, and that would give you the time to take whatever
3 discovery is reasonable and relate it to the class
4 certification issues and brief the new issues, at least to me
5 they're new issues, plus anything else that comes up along the
6 way at class certification, then the reply could be due
7 15 days after that or something. And we could schedule for
8 another argument, and it would probably be around April we
9 would be ready for that argument, and I can put that in the
10 Order that results from today's hearing.

11 Does that make sense?

12 MR. FITZPATRICK: Yes, I think that's reasonable,
13 your Honor, and I'm in agreement with that.

14 MR. MILSTEIN: Do we know what the judge is going to
15 do on remand, is there something pending?

16 THE COURT: Yes, it was remanded to Judge Hayden and
17 the first issue that she confronted is whether seven different
18 cases should be consolidated, and she wrote an opinion that
19 denied consolidation. I could give you the cite, I think, if
20 I can find it.

21 MR. LEWIS: We can get to it.

22 MR. MILSTEIN: I can get it. I was wondering if
23 there was a motion pending right now that we're waiting on.

24 THE COURT: I don't know, you can check the PACER
25 docket.

1 MR. MILSTEIN: Okay.

2 THE COURT: It had been briefed, it does mention
3 that. This opinion that I'm looking at after the remand came
4 out on June 22nd and that opinion says that the parties were
5 briefing the issue at that time. So I'm sure briefing is
6 concluded, there could even be a decision. Her decision
7 wouldn't -- it would be persuasive but it wouldn't be binding
8 here on a fellow judge in any event. But I think that,
9 coupled with my need to know more to assure the adequacy of
10 the plaintiff itself would be helpful.

11 Anything else before we adjourn?

12 MR. LEWIS: With regard to the admissibility of the
13 computer data issues, what are the parameters there? We
14 certainly don't want a situation where counsel decides that he
15 wants to take 15 depositions. I mean, are you talking about
16 deposition of Caroline Abraham only?

17 MR. FITZPATRICK: No way. I want to take the
18 deposition of Brian Wanca, Ryan Kelly, and Caroline Abraham
19 and Joel Abraham, who he represented to you this afternoon is
20 the actual source of the data, and others, I may have others
21 as well. But I don't see this as limiting me in what I'm
22 required to do at this point and I don't see the basis for any
23 preliminary limitation.

24 THE COURT: I think that's reasonable, the four that
25 you mentioned. Maybe you don't need them all but maybe you do

1 and maybe you need others, but I'll leave that to you. And
2 I'll ask counsel to cooperate so that it becomes easier to
3 serve the deponents and get their depositions done. Hopefully
4 there won't be problems in getting that done. And it's not an
5 idle exercise, if the class is certified, then I think that
6 sort of discovery goes a long toward the merits itself and it
7 would be useful. And by the same token the defendant would be
8 permitted to convene the deposition of the designated class
9 representative if you choose to, I'm not requiring these
10 things but I'm giving you an opportunity.

11 MR. FITZPATRICK: I forgot to mention him, but that's
12 obvious, I certainly want City Select.

13 THE COURT: I'll enter an Order. The reasons for the
14 Order I've explained just now on the record as best I can,
15 there won't be a written Opinion, but I will track through in
16 my Order the steps that I'm asking counsel to take and the
17 time line for doing it.

18 MR. LEWIS: Okay.

19 THE COURT: And you should see that on the docket on
20 Monday morning. Okay? So thank you, everybody.

21 MR. FITZPATRICK: Thank you, your Honor.

22 MR. LEWIS: Thank you.

23 (Proceedings Concluded)

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C E R T I F I C A T E

I, LISA MARCUS, Official Court Reporter for the United States District Court for the District of New Jersey, Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcription of my original stenographic notes to the best of my ability of the matter hereinbefore set forth.

S/Lisa Marcus, CSR
LISA MARCUS
Official U. S. Reporter
N.J. Certificate No. XI01492

DATE: January 14, 2013

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